

HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

IN RE EBAY SELLER ANTITRUST
LITIGATION

CASE NO. C09-735RAJ
ORDER

I. INTRODUCTION

This matter comes before the court on a motion (Case No. C09-959RAJ, Dkt. # 1) from Amazon.com, Inc. (“Amazon”) to quash a subpoena that eBay, Inc., (“eBay”) issued in connection with an antitrust action against eBay pending in the United States District Court for the Northern District of California. N.D. Cal. Case No. 5:07-01882 JF (RS). eBay has also moved to seal (Dkt. # 17) several documents. For the reasons stated below, the court GRANTS the motion to quash and the motion to seal.

II. BACKGROUND

This order assumes familiarity with two orders the court has already entered. Those orders, particularly the first of them, articulate the legal principles that guide the court’s decision today. On August 17, the court partially granted a motion from the plaintiffs in the antitrust litigation to compel Amazon’s compliance with a subpoena. Aug. 17, 2009 Ord. (Dkt. # 11). The court held, however, that the plaintiffs had not shown “substantial need” in accordance with Fed. R. Civ. P. 45(c)(3)(B)(i) for what the court deemed “competitively sensitive” documents. The court recognized that the plaintiffs might be able to articulate substantial need for those documents however, and

1 thus declined to terminate the subpoena enforcement proceeding. The court ordered the
2 plaintiffs to file a quarterly status report on the underlying litigation and their efforts to
3 obtain discovery from Amazon. In the first of those reports, which the plaintiffs filed on
4 October 13, the plaintiffs stated that they continue to work with Amazon regarding
5 discovery, and had no relief to request at that time. Dkt. # 25.

6 In part, the plaintiffs were waiting for this order, which will resolve Amazon's
7 motion to quash a second document subpoena arising from the antitrust litigation. The
8 second subpoena came from eBay. As the court observed in its second order on
9 September 2, eBay's subpoena was "substantially identical" to the one the plaintiffs
10 served. The court ordered eBay and Amazon to meet and confer in light of the August 17
11 order to determine if they could agree on the scope of Amazon's document production,
12 and to submit supplemental briefing if they were unable to do so.

13 Although eBay and Amazon substantially narrowed the scope of documents eBay
14 sought in the subpoena, they did not reach agreement. Having reviewed the parties'
15 supplemental briefing, the court now resolves Amazon's motion to quash.

16 **III. ANALYSIS**

17 As the court has found in both of its prior orders, there is little doubt that Amazon
18 has information that is relevant in the antitrust litigation. According to eBay, Amazon is
19 its direct competitor in the market for third-party online sales platforms and in the market
20 for online payment systems. Part of eBay's defense in the antitrust lawsuit is that
21 because of competitors like Amazon and others, the plaintiffs cannot prove that eBay has
22 market power in those markets. The plaintiffs advocate a narrower definition of the
23 relevant markets, a definition that excludes Amazon. Information about the extent to
24 which third-party buyers and sellers use or could use eBay's and Amazon's services
25 interchangeably is relevant to these issues.

26 Much of the relevant evidence, however, comes from eBay itself, or is information
27 about eBay's alleged competitors that is either publicly available or not competitively

1 sensitive. The court has already ordered Amazon to produce a host of objective
2 information about its third-party sales platforms and its payment systems. There appears
3 to be no dispute that Amazon has provided that information. Using it, eBay should be
4 able to construct a historical model of Amazon's offerings in the relevant markets as well
5 as the prices for those offerings.

6 Amazon's information has already been of use to eBay in the underlying litigation.
7 eBay retained Kevin Murphy, an economist, as an expert witness. Using only
8 information about Amazon's prices for users of its third-party sales platforms, Mr.
9 Murphy opined that Amazon's prices serve as a competitive constraint on eBay's pricing
10 power. Robison Decl. (Dkt. # 20), Ex. B at ¶¶ 58-64, Exs. 10-13. He opined on the
11 scope of the relevant market using the same information. *Id.* at ¶¶ 88-89.

12 eBay wants more from Amazon, however. It began with 23 requests for
13 documents, and has now narrowed those requests to five topic areas: comparisons
14 between Amazon's fees and eBay's fees; information on the growth of Amazon's
15 Marketplace service; customer surveys of Marketplace users; documents showing why
16 Amazon discontinued its auction platform in 2006; and documents showing Amazon's
17 efforts to attract new sellers, particularly eBay sellers. Robison Decl. (Dkt. # 20) ¶ 3.

18 For the most part, the narrowed requests confirm what eBay scarcely disputes: the
19 court understates matters by referring to the documents eBay seeks from Amazon as
20 "competitively sensitive." eBay wants documents that reveal the core of Amazon's
21 competitive strategy, including its strategy with respect to eBay, as well as non-public
22 information about the success of Amazon's third-party sales platforms.¹

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25 ¹ Not every document falling within eBay's list of topics is necessarily confidential. For
26 example, Amazon must produce documents revealing its historical pricing, which would permit
27 eBay to compare those prices to its own. By contrast, an Amazon document directly comparing
28 its prices to eBay's prices is likely to be competitively sensitive, as it will reveal Amazon's
assessment of the comparison, how Amazon will use the comparison, or another aspect of its
strategic thinking.

1 To the extent eBay has similar documents of its own, it considers them highly
2 confidential. For example, it commissioned an analysis of its customers independent of
3 the underlying litigation, and submitted that analysis in the underlying litigation.
4 Robinson Decl. (Dkt. # 20), Ex. C. The analysis discusses eBay’s competitors for third-
5 party sales platforms, including Amazon. *Id.* It contains recommendations for improving
6 eBay’s performance relevant to the competitors. *Id.* Tellingly, eBay deems this
7 document “highly confidential,” has filed it under seal in the antitrust litigation, and has
8 moved to file it under seal in this court. It has done the same with the competitive
9 assessments of its expert economist, as well as with portions of its briefs in the antitrust
10 litigation that set forth its assessment of the relevant markets.

11 The court also finds that eBay’s subpoena, even as narrowed, would require
12 Amazon to devote substantial resources to complying with it, at substantial expense.
13 Amazon likely has thousands of responsive documents, and those documents are likely
14 stored in many locations by many different custodians. The court declines to further
15 discuss Amazon’s concerns about expense, however, as the court has the power to
16 remedy those concerns by requiring eBay to pay for Amazon’s production.

17 With those preliminaries established, the question before the court is whether it
18 should require Amazon to disclose possibly relevant but highly competitively sensitive
19 information to its competitor. The court reviewed the law applying to that question in its
20 prior orders, concluding that eBay must demonstrate a substantial need for such
21 documents. Applying that standard, the court concludes that Amazon does not have to
22 produce its competitively sensitive information to eBay.

23 First, the record suggests that Amazon’s competitively sensitive information is
24 likely to be, at best, marginally more valuable than the evidence already in eBay’s
25 possession. The arguments and evidence in the antitrust litigation reveal that eBay has
26 crafted a robust argument that Amazon competes with eBay in both the third-party sales
27 market and the online payments market. Even if Amazon’s competitively sensitive

1 information would assist eBay in making those arguments, there is no evidence that
2 convinces the court that they would add more than marginal weight. In eBay's own
3 words, documents from Amazon would at best provide an "independent basis" for
4 accepting its arguments. EBay Supp. Opp'n (Dkt. # 19) at 6. For example, while eBay
5 requests documents that reveal whether Amazon experienced changes in consumer
6 demand in response to changes in eBay's prices or policies, eBay already has information
7 about whether it experienced changes in demand after changes in Amazon's prices or
8 policies. EBay's own documents seem sufficient to illuminate the competition between it
9 and Amazon. In another example, eBay claims that it needs highly sensitive documents
10 revealing why Amazon discontinued its auction platform in 2006 to counter the plaintiff's
11 expert's contention that Amazon would compete in that market but for eBay's
12 anticompetitive conduct. Yet the plaintiff's expert rendered his opinion without the
13 benefit of inside information from Amazon, suggesting that eBay does not have a
14 substantial need for inside information to counter his opinion. EBay's plea for disclosure
15 of Amazon's competitively sensitive information is based not on its inability to mount a
16 defense in the antitrust litigation, but its desire to mount a "Fulsome Defense." EBay
17 Supp. Opp'n (Dkt. # 19) at 9. In short, mitigating against any claim of "substantial need"
18 is that both parties have demonstrated that they can vigorously pursue their contentions
19 without Amazon's competitively sensitive information.

20 Second, much of the information eBay seeks from Amazon could be obtained
21 from other sources. Whatever analyses Amazon has conducted of the relevant markets
22 are analyses that eBay could conduct itself. Although Amazon and eBay zealously guard
23 information about consumers, consumers themselves rarely object to providing the
24 information. If eBay wishes to know, for example, the extent to which buyers or sellers
25 who use third-party sales platforms view eBay and Amazon as substitutes, it can ask
26 them. Indeed, the record reveals that it has already done so. Requiring Amazon to turn
27 over the fruits of its own inquiries into consumer preferences is to conscript Amazon to

1 work for eBay. eBay does not have a substantial need to force Amazon to turn over
2 market analyses that eBay could conduct on its own.

3 Third, eBay cannot ensure protection of Amazon's competitively sensitive
4 information. eBay has offered to protect that information by disclosing it only to its
5 outside counsel. eBay does not mention that any documents it obtains from Amazon
6 must likely be disclosed to the plaintiffs, and does not discuss whether the plaintiffs
7 would agree to confidentiality restrictions. The court puts that concern aside for the sake
8 of argument, and assumes that any confidentiality restriction would apply equally to the
9 plaintiffs. Those restrictions may serve Amazon well for information that turns out to be
10 of no value in the antitrust litigation. To the extent that Amazon provides documents that
11 are important to the antitrust litigation, however, how can eBay protect them? Outside
12 counsel cannot incorporate such documents into eBay's defense without consulting with
13 eBay insiders. In doing so, they will necessarily reveal competitively sensitive
14 information directly to eBay. This is likely the worst potential harm to Amazon, but it
15 must also face the risk that its information will be disclosed beyond eBay. If either the
16 plaintiffs or eBay wish to rely on Amazon's information, they must submit it to the court
17 in the antitrust litigation. The court assumes for the sake of argument that the antitrust
18 litigants will be diligent about taking all measures to seal Amazon's information in filings
19 before that court, although it acknowledges Amazon's concern that outsiders have much
20 less motivation to protect that information. The parties cannot ensure that the court in the
21 antitrust litigation will protect Amazon's documents, and Amazon will have no say in the
22 matter. Moreover, no one has addressed how they would protect Amazon's confidential
23 information if they wanted to rely on it at trial or in another public court proceeding.

24 In conclusion, the court does not doubt that Amazon has information that would be
25 of value to the parties in the antitrust litigation. The same can be said of non-party
26 competitors in any antitrust litigation. Nothing, however, compels a competitor who
27 wishes to stay outside the fray of antitrust litigation to let the litigants rummage through

1 its files, particularly its confidential files. The court has consistently required Amazon to
2 disclose evidence about its business to assist the antitrust litigants in defining the relevant
3 markets and competition within them. The court has consistently declined, however, to
4 require Amazon to turn over its competitively sensitive information. The supplemental
5 briefing does not convince the court to change its course.

6 **IV. CONCLUSION**

7 For the reasons stated above, the court GRANTS Amazon's motion to quash (Case
8 No. C09-959RAJ, Dkt. # 1) and GRANTS eBay's motion to seal² (Dkt. # 17). The court
9 denies Amazon's request for attorney fees and costs. The court finds that eBay made a
10 good faith effort to limit its subpoena, and that its arguments in favor of compliance with
11 the subpoena were not unreasonable. Fed. R. Civ. P. 45(c)(1) (permitting sanctions only
12 where subpoena proponent failed to "take reasonable steps to avoid imposing undue
13 burden or expense").

14 As was the case when the court addressed Amazon's dispute with the antitrust
15 plaintiffs, the court cannot be certain if this order puts an end to the discovery dispute
16 between the parties. To the extent that it has not already done so, Amazon remains
17 obliged to produce documents that are responsive to the antitrust litigants' requests but
18 are not competitively sensitive. Moreover, it is possible that developments in the
19 antitrust litigation will shed new light on the need for documents from Amazon.
20 Accordingly, the court directs eBay to submit a status report on the tenth day of every
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24 ² eBay's motion to seal targets three documents that it already filed under seal in the antitrust
25 litigation. eBay filed redacted versions of those documents in this court, and did not place them
26 under seal. Robison Decl. (Dkt. # 20), Exs. A-C. The documents that it wishes to seal are the
27 unredacted versions of the same exhibits. So far as the court is aware, eBay provided the
unredacted documents to the court, but did not file them. The court finds that eBay has
established good cause to file the documents under seal, *see* Local Rules W.D. Wash.
CR 5(g)(2), but orders eBay to file those documents so that they may be made part of the formal
record.

1 third month, beginning on January 10, 2010. Those reports must include information
2 sufficient for the court to assess whether to allow this matter to remain pending.

3 DATED this 23rd day of December, 2009.

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7 The Honorable Richard A. Jones
8 United States District Judge
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